National Association of Manufacturers

TESTIMONY OF

SHARON SPIGELMYER
DIRECTOR, HUMAN RESOURCES AND EQUAL OPPORTUNITY

NATIONAL ASSOCIATION OF MANUFACTURERS

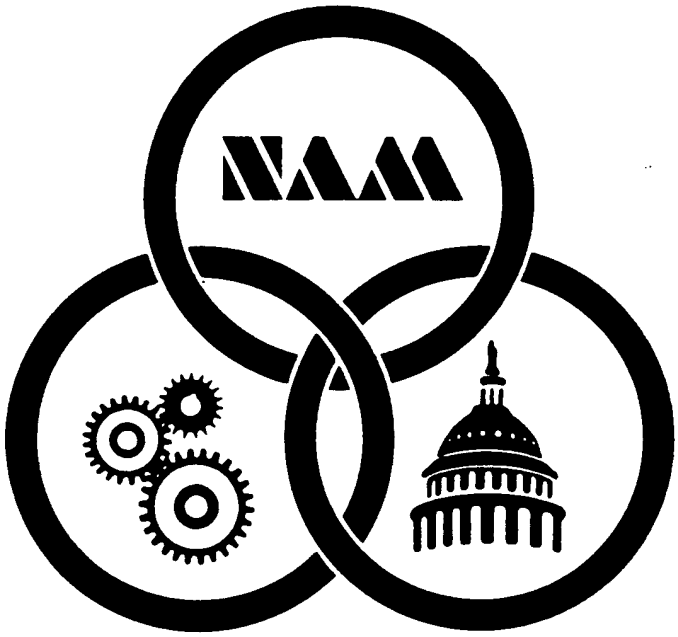
ON

H.R. 3008
"THE FEDERAL EQUITABLE PAY PRACTICES ACT OF 1985"

BEFORE

THE HOUSE SUBCOMMITTEE ON COMPENSATION AND EMPLOYEE BENEFITS

July 23, 1985



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Madame chairman and members of the subcommittee, I am Sharon Spigelmyer, Director of Human Resources and Equal Opportunity with the National Association of Manufacturers. I am here today representing our 13,600 corporate members, which include manufacturers of every size and industrial class located in every state. NAM members employ 85 percent of the workers in manufacturing employment and produce more than 80 percent of the nation's manufacturered goods.

On behalf of all of our members, I'd like to thank you for the opportunity to address our concerns with H.R. 3008, "The Federal Equitable Pay Practices Act of 1985." Let us first state that we have no opposition to the federal government reviewing its wage system to determine if there are prohibitions to the hiring, promotion and training of minorities and women. Violations of Title VII of the Civil Rights Act or the Equal Pay Act should not be tolerated in either the public or private sectors.

But, H.R. 3008 goes far beyond reviewing the federal pay system for violations of current law. In fact, the bill would change present law by creating a presumption of wage discrimination wherever there is an unexplained wage gap. Thus, through a study bill the Congress is arguably giving its approval to the controversial and unacceptable concept of comparable worth. NAM members will continue to oppose any legislation which will set a precedent for discrimination claims based solely on the comparison of dissimilar jobs.

Furthermore, NAM believes this type of study will obligate the Congress to implement the results of any study, despite the costs or validity of those results. Based on costs of implementing comparable worth studies in Minnesota and Iowa, the federal government could find itself with additional wage liabilities of $5 to $8 billion. The taxpayers should not be saddled with these costs...which will neither eliminate discrimination nor improve efficiency in the government.

H.R. 3008 outlines a review of the federal system based on an analysis of job content and economic factors. Certainly this is an improvement over H.R. 27, which called for an analysis of job content only in rooting out supposed discriminatory practices. But, the basic flaws of H.R. 27 remain in H.R. 3008. First the bill continues to assume that job evaluations are an objective measure of the inherent worth of a job and resultant discimination. They are not. Secondly, the bill wrongly assumes that Title VII of the Civil Rights

Act and the Equal Pay Act encompass a comparable worth theory of discrimination. They do not.

I. Job Evaluations: Subjective Tools in Wage Setting

In its 1981 report, Women, Work, and Wages, the National Academy of Science stated that job evaluations were "inherently subjective" and "less than optimal" to resolve pay disputes. Specifically, the National Academy of Science noted that several features of existing evaluation systems made them anything but an exact science. First, the NAS pointed out, factors and factor weights may be biased; 2) the the entire evaluation process is subjective, therefore reflecting the values of those conducting the study; 3) statistical procedures in determining factors and factor weights have serious shortcomings; and 4) the use of more than one study within one entity can call for different valuations of different sectors of the workforce.

The NAS concluded, however, that evaluations are helpful tools in wage setting practices. NAM agrees. But, they are subjective and cannot by themselves be used to evaluate the extent of either sex, race or "ethnic" discrimination. This is the opinion of the overwhelming majority of the courts in this country, as well as the experts.

U.S. District Court Judge Charles P. Kocoras, in dismissing the American Nurses Association comparable worth claim against the State Of Illinois, No. 84-C-4451 (E.D. Ill., April 4, 1985), slip opinion,

page 11, stated, "Because jobs do not have an intrinsic value that can be scientifically measured, the limitations inherent in job evaluation techniques prohibit the proposed extension of Title VII.

This opinion of job evaluations is shared by most other courts. In Briggs v. City of Madison, 536 F. Supp. 435 (W.D.Wis. 1982), Judge Barbara Crabb also rejected the notion that job evaluations could measure sex discrimination. She said, "I find unpersuasive the basic premise that ... anyone posseses the intellectual tools and data base that would enable them to identify the extent to which the factor of discrimination has contributed to or created, sex segregated jobs, and to separate that factor from the myriad of nondiscriminatory factors that may have contributed to the same result." Id. at 444.

NAM agrees with these courts and other experts. Job evaluations are not objective, as stated by H.R. 3008. Thus they cannot and should not be used to determine sex or race discrimination. NAM does not believe "objective" measures of economic factors or job content factors can be made.

Quantifying individual merit, supply and demand, and/or the impact of union agreements, is not scientific. It is personal and subjective. Defining and quantifying skills, training, education and responsibilities of dissimilar jobs is equally as difficult. Different job evaluators simply will come up with different results.

A perfect example is a case recently decided by the examiner of the Alaska State Commission for Human Rights. In Alaska State Commisison for Human Rights vs. State of Alaska, No. D-79-0724-188-E-E, November 23, 1984, the plaintiffs were a group of public health nurses, predominantly women, who claimed they should be paid the same as physician's assistants, primarily men. Two separate job evaluation studies by two independent and well-known job evaluators were undertaken. In every area -- from training, skills, education and working conditions -- the two evaluators came up with opposite conclusions. And finally, the hearing examiner disagreed in part with the conclusions and methodology of both evaluators. The examiner found that no decision could be made in a case where all experts disagreed. This case merely serves to illustrate the subjectivity of job evaluations and how firmly their results are tied to the methodology of the evaluator.

In addition to the overall concerns we have with the bill's definition of job evaluations as objective, NAM is also concerned about the limits of "economic analysis" in H.R. 3008. Economic analysis is defined to mean "an objective method" for evaluating pay differentials based on "job-related factors such as seniority, merit, productivity, education, work experience, or veteran status; geographic factors; and other factors, exlusive of sex, race and ethnicity." Since the bill does not specifically allow for market factors such as supply and demand, this critical component in wage setting could easily be left out by the private consultant. This

should be explicitly included in any analysis of the federal government.

In conclusion, the bill says any unexplained differences in jobs that are "equivalent in totality" is deemed to be inconsistent with Title VII or the Fair Labor Standards Act. That is, the federal government will be considered to be in violation of discrimination laws -- based solely on the findings of a subjective study by a job evaluator.

II. H.R. 3008's Presumption of Discrimination Substantially Changes Present Law

H.R. 3008 purports to determine whether the federal pay system is consistent with the policy of Title VII and the Equal Pay Act that sex, race and ethnicity should not be among the factors in determing the rate of pay for an individual.

However, the bill goes far beyond those two laws. By creating a presumption of discrimination for any unexplained wage differences in jobs not explained by the evaluations, H.R. 3008 shifts the burden to the government to prove that any difference is not discrimination. Under present law, the burden is on the person alleging the discrimination to establish intentional wage discrimination. Only then, is the employer required to establish that its actions were nondiscriminatory. Thus, this bill sets the government up to be

guilty of sex, race and "ethnicity" discrimination until proven innocent.

Title VII makes it an unlawful employment practice for an employer to discriminate based on race, color, religion, sex or national origin against a person in hiring, compensation, promotion, training, or classification. The Equal Pay Act specifically prohibits paying women differently than men for doing the same job.

While these laws are very broad in the type of discrimination prohibited, the overwhelming majority of courts, including all federal circuit courts, have rejected comparable worth per se as a theory upon which to base a complaint.

The theory was rejected by the Eighth Circuit in Christensen v. State of Iowa, 563 F.2d 353 (1977), the Ninth Circuit in Spaulding v. University of Iowa, 740 F.2d 686 (1984), the Tenth Circuit in Lemon v. City and County of Denver, 620 F.2d 228 (1980) and the Fifth Circuit in Vuyanich v. Republic Nat. Bank of Dallas, 723 F. 2d 1195 (1984). Federal courts, in strong statements, have rejected comparable worth, calling it "subjective," "inappropriate of judicial resolution," a "sweeping revision of market wage rates," and a "hopeless morass."

The only case to uphold a comparable worth-type case, AFCSME v. State of Washington, No. C82-465T (W.D. Wash. Dec. 14, 1983), has been argued before the same Ninth Circuit which rejected comparable worth in Spaulding v. University of Iowa, 740 F.2d 686 (1984). The circuit

court is expected to hand down its ruling sometime in August. Many are expecting that the case will be remanded for further evidence or rejected outright. At any rate, the ramifications of the case are so great, that it would only make good sense for the Congress not to proceed with any bill until the court hands down its decision.

The state of Washington is facing a $1 billion liability for failing to implement its state study if the case is upheld. Such financial implications for the federal government are dozens of times greater.

In the only U.S. Supreme Court case to address the issue, Gunther v. The County of Washington, 452 U.S. 161 (1981), the Court specifically stated it was not deciding a comparable worth case, but added that Title VII would cover jobs that were not identical where intentional discrimination could be proven.

The federal Equal Employment Opportunity Commission on June 17, 1985, categorically rejected a claim under Title VII showing nothing more than a wage differential between allegedly comparable jobs. The commisison concluded that "the mere predominance of individiauls of one sex in a job classification is not sufficient to create an inference of sex discrimination in wage setting." In rejecting a claim that was based solely on a comparison of one job to another that was paid more, the EEOC observed that "Congress never consented to wholesale governmental restructing of the valuations of jobs established by the non-sex based decisions of employers, the

collective bargaining process, or by the mechanisms of the marketplace."

H.R. 3008 would depart from years of case law and the leading civil rights enforcement agency in determining sex and race discrimination for the federal government based on comparable worth. NAM believes this will set a precedent for the private sector which would lead to untenable government intrusion in the wage setting process.

III. H.R. 3008 Examines Only Certain Minority Groups for Discrimination

H.R. 3008 is baffling in yet another aspect. It states as its purpose to review the federal position classification system based on Title VII and Equal Pay Act principals. Title VII prohibits discrimination based on race, color, religion, sex or national origin.

Yet, this bill focuses on race, sex and "ethnicity." Ethnicity is defined as "the quality of being, or not being, of Hispanic origin." The term ethnicity or specific reference to Hispanics is nowhere contained in Title VII. Furthermore, no interest is shown in practices that may be evidence of discrimination against other ethnic groups.

H.R. 3008 says an analysis of jobs will be conducted where there is a "numerically predominant" number of either sex, or where any race or the ethnic group (Hispanic) is disproportionately represented. No

definition of numerical predominance is given, nor is any definition of disproportionate represention outlined. This could be particularly important as a guideline to the study commission.

At any rate, NAM believes that it is not a good personnel practice to look at jobs only dominated by one sex or by a particular race. It has a deterrent effect on job categories which have successfully integrated all segments of the workforce. Those jobs which are comprised of roughly equal numbers of men and women will not be reviewed to see if wage adjustments are needed. This highlights the fact that the study is neither interested in the value of jobs, nor in rooting out Title VII and Equal Pay Act violations. Rather, the study is aimed at establishing comparable worth as the standard for discrimination.

IV. The Commission on Equitable Pay Practices

The eleven-member commission charged with overseeing the preparation of a consultant's report certainly represents a more balanced group than H.R. 27 did. However, the commission is given sweeping authority which is bound to infringe on the rights of many employees and managers. The Commission created under H.R. 3008 will have a permanent staff, including a director and from three to five technical advisors.

The commission is given subpoena authority to require the attendance and testimony of witnesses and the production of evidence

"from any place within the United States at any designated place of hearing within the United States. It provides for no privacy protection or any need to justify the purpose of evidence. Such expansive authority seems unjustified for conducting a study of the federal employment system.

V. Conclusion

NAM opposes H.R. 3008 for the same basic reasons it opposed H.R. 27. It expands current discrimination laws -- based on sex, race and some new form of discrimination called "ethnicity" -- to include a comparable worth concept. It would undoubtedly cost the federal government an additional $5 to 8 billion in wages, based on similar comparable worth studies in Minnesota and Iowa.

Finally, this redefinition of Title VII is bound to signal the courts that Congress intends to expand current laws. Any revision of current laws that relies on job evaluations as "objective" measures of discrimination will lead to unfair and unwieldy court examinations of wage setting.

NAM does not oppose a review of the current federal system to determine if women or minorities are being denied opportunities, promotion, training or equal pay for equal work. However, we oppose a bill which calls for comparing dissimilar jobs to determine discrimination.